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January 30, 2007

Chief Justice Clifford W. Taylor
c/o Supreme Court Clerk
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

Re: ADM File No. 2006-03 - Amendment to Michigan Court Rule 6.106

Dear Chief Justice Taylor:

On behalf of the Michigan Professional Bail Agents Association, we write to support the proposed amendment to Michigan Supreme Court Rule 6.106 to clarify that judgment may not be entered against sureties on bail bonds for failure of criminal defendants to comply with bond conditions other than the appearance of defendants. This amendment will protect the due process rights of criminal defendants and help preserve the integrity of the pre-trial judicial process.

Purpose of Bail

The ability of a criminal defendant to be released on bail serves a vital interest in the administration of justice. Indeed, criminal defendants have a constitutional right to bail. Article 1, §15, Michigan Constitution. Defendants who might not otherwise have the means to post a bond in the court-ordered bail amount, can, often with the assistance of family and friends, utilize the services of professional bail agents and sureties to do so at relatively low cost. In addition to allowing the defendant to exercise their constitutional right for pre-trial release, the use of bail agents and sureties helps counties and local units of government better manage their detention resources and helps relieve jail overcrowding.

Under long-established law, bail is the means to insure the future attendance of criminal defendants in court. See, e.g., *People v Won Kang*, 209 Mich. App. 540, 544 (1995) (citing *People v. Benmore*, 298 Mich. 701, 707 (1941) ("It is well settled that the purpose of a bond is to assure the appearance of a defendant . . ."). Bail agents are responsible for assuring the appearance of defendants. Applebaum, 10A, *Insurance Law & Practice*, §6116, et seq.

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Forfeitures for Failure to Appear

A court can, and should, forfeit a surety bond for a criminal defendant released on bond who fails to make a court appearance. M.C.R. 6.106(I)(2) provides that "[i]f the defendant has failed to comply with the conditions of release, the court may arrest the defendant and enter an order revoking the release order and declaring the bail money deposited or the surety bond, if any, forfeited." MCR 6.106(I)(2). *See also* Form MC 218, "Order Revoking Release and Forfeiting Bond and Provide Notice of Intent to Enter Judgment."

Revocation for Failure to Perform Other Conditions

The court also has the authority to impose restrictive conditions upon the liberty of the accused designed to ensure good pretrial behavior (for example, curfews or prohibitions against the consumption of alcohol or drugs), as well as protective conditions intended to promote public safety (such as no contact with an alleged victim or entry onto particular property). (*see, e.g.*, M.C.L. §765.6b(1)).

Yet, these laws only allow courts to revoke bond for those unwilling to abide by the restrictive and protective conditions of bond; they do not authorize a forfeiture judgment to be entered against a surety. For example, the Crime Victim's Rights Act provides that "[b]ased upon any credible evidence of acts or threats of physical violence or intimidation by the defendant or at the defendant's direction against the victim or the victim's immediate family, the prosecuting attorney may move that the bond or personal recognizance of a defendant be revoked." MCL §780.755(2). *See also* MCL §780.815(2); MCL §765.6b(1). This has the effect of punishing (by revocation of the release order) the defendant for his or her conduct, but not punishing someone other than the defendant (*i.e.* the surety or friend or family member who secured the bond) since they do not authorize entry of a forfeiture judgment against the surety.

Obligations of Sureties Fulfilled Upon Appearance

The statutory law is quite clear regarding the absolution of the surety upon fulfillment of the surety's duty to see that the defendant makes his or her date in court, including those instances where the defendant is brought in to answer to an alleged violation of a condition of his or her release. MCL §765.26(2) provides that "[u]pon delivery of his or her principal at the jail by the surety or his or her agent or any officer, the surety shall be released from the conditions of his or her recognizance." MCL §765.26(1) also provides that "[i]n all criminal cases where a person has entered into any recognizance for the personal appearance of another and such bail and surety afterwards desires to be relieved from responsibility, he or she may, with or without assistance, arrest or detain the accused and deliver him or her to any jail or to the sheriff of any county." Both provisions make clear that a court would have no power to enter judgment against a surety once the surety has delivered the defendant, regardless of whether the defendant has violated other conditions of release. These provisions intend to reward a surety who, through its own diligence, apprehends and surrenders the defendant to the appropriate authorities. *People v Meadows (In re Forfeiture of Surety Bond)*, 208 Mich. App. 369, 371 (1995).

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Other statutory provisions support the notion that surrender of the defendant relieves the surety of all liability notwithstanding the defendant's failure to perform other conditions. MCL §765.28 provides detailed procedures for the rights and obligations of a surety upon a "default" in a recognizance, including the right of the surety to be given an opportunity to show good cause "for the defendant's failure to appear." If the defendant does not appear and surrender or good cause is not shown for the defendant's failure to appear within 28 days of notice, the court may then enter judgment against the surety for up to the full amount of the bond. MCL §765.28. *See also* Form MC 238, "Judgment after Bond Forfeiture." The law provides no such provisions for the defendant's failure to perform other conditions; it does not contemplate that the failure to perform such conditions would constitute a default that would trigger liability for the surety.

MCL §765.28 further provides that "the court shall set aside the forfeiture and discharge the bail or surety bond within one year from the date of forfeiture judgment if the defendant has been apprehended, the ends of justice have not been thwarted, and the county has been repaid its costs for apprehending the person." Similarly, MCL §765.15 provides that "[t]he court shall set aside the forfeiture and discharge the bail or bond, within one year from the time of the forfeiture judgment . . . if the person who forfeited bond or bail is apprehended, the ends of justice have not been thwarted, and the county has been repaid its costs for apprehending the person." These provisions confirm that a surety would be relieved of liability upon surrender of the defendant. There is no suggestion that the discharge would not be allowed if the defendant has violated other terms of his or her release.

The statute concerning admission to bail provides that a defendant may be "held to bail for his appearance" MCL §765.4. It does not authorize a defendant to be held based on compliance with other conditions.

Court opinions confirm that the statutes should be read as releasing sureties upon appearance of the defendant. "The essence of a bail bond contract is the assurance of the defendant's appearance and the surety is not released from liability on a bail bond contract until the principal is delivered to the county authorities." *People v Harbin*, 88 Mich. App. 341, 343 (1979); MCL §765.26; MSA §28.913.

Court opinions in other states acknowledge that breach of a condition of release is grounds for revocation of the release, but is not grounds for entering a forfeiture judgment against a surety if the defendant makes his or her required court appearance. As the Ohio Supreme Court stated:

The breach of a condition of release provides an adequate basis to revoke the release. However, simply because a condition of release may be imposed upon a defendant does not mean that the breach of such a condition requires the forfeiture of a bail bond Accordingly, timely production of the body of the defendant constitutes a showing of good cause why a forfeiture judgment may not be entered against a surety. This determination comports with the purpose of bail which is to ensure the appearance of a defendant. *Ohio v Holmes*, 57 Ohio St. 3d 11, 14; 564 N.E.2d 1066 (1991).

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The same result was found in Illinois, even when that state's bail forfeiture statute mandates forfeiture for broken bond conditions:

The State contends that forfeiture is a necessary sanction for punishment of defendants who violate bond conditions [Such an] interpretation leads to extreme results. For example, the bail condition in the present case prohibited the respondent from violating "any criminal law of the State of Illinois or any ordinance of any municipality of said state." Accepting the State's position, a defendant out on a \$200,000.00 bond must have his bond forfeited and a \$200,000.00 judgment entered against him even if he is guilty of only a traffic violation. This would be absurd and clearly not the purpose of the bail forfeiture statute.

~~We hold that . . . (the bail forfeiture statute) . . . does not authorize a forfeiture (as distinguished from modification or revocation) of bond for the violation of any bond condition other than a defendant's failure to make a timely appearance in a designated court. In re E.H., 78 Ill. App. 3d 854, 856-7; 397 NE2d 571 (1979).~~

That holding was followed by another Illinois decision, *Illinois v Klein*, 115 Ill. App. 3d 582, 450 NE2d 1268, 1271 (1983), and was cited by the Supreme Court of Vermont, which, in a similar case, stated:

Clearly, forfeiture of cash bail for breach of conditions other than an appearance transforms monetary bail from a guarantor of appearance into a potentially punitive tool useful in the enforcement of all bail conditions. The purpose of forfeiture, however, is not to punish, but to assure that the defendant will appear at court when required

In this case, the court ordered forfeiture on the basis of a breach of condition prohibiting certain types of future criminal conduct. There was no allegation that the defendant had failed to appear before the court as required by the original bail order. Under these circumstances, we hold that the trial court could not order forfeiture of defendant's previously posted cash bail

[P]unitive forfeiture of cash bail, originally imposed as a means of assuring a defendant's appearance at court, is not the appropriate method of enforcing other conditions of release A court can take steps, other than forfeiture of cash bail, to enforce its bail orders. If a defendant violates conditions of release other than an appearance condition, the court can impose increasingly more restrictive conditions, as well as revoke the right to bail altogether, if the court determines that . . . the defendant's breach of bail conditions constitute a threat to the integrity of the judicial process. *Vermont v Cardinal*, 147 Vt. 461, 464-5; 520 A21 984 (1986) (citations omitted).

In *Vermont v Brown*, 384 Vt. 104 (2003), the Vermont Supreme Court stated that bail may not be forfeited for breach of conditions other than appearance because doing so transforms monetary bail from a guarantor of appearance into a potentially punitive tool.

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Need for Amendment to Rule 6.106(I)(2)(b)

Some Michigan courts, despite the clear statutory and case authority to the contrary as described above, have entered judgment against sureties on bail bonds for failure of a criminal defendant to comply with conditions of the bond other than the defendant's appearance, even when the defendant is surrendered to the court. Because of the inability of sureties to take on this extraordinary risk, this practice jeopardizes the ability of a criminal defendant to post bond, puts the assets of the defendant's family at significant risk and undermines the defendant's due process rights.

The problem seems to stem from differing interpretations of Michigan Court Rule 6.106(I)(2)(b), which has been read by some to allow entry of judgment against a surety after the defendant has been surrendered.

The proposed amendment to Rule 6.106(I)(2)(b) would resolve this ambiguity. The amended rule would continue to allow the courts to hold a surety fully liable for a defendant's failure to appear. It would also allow the courts to revoke a release order for a defendant who fails to comply with protective conditions even in cases where a defendant does appear. This would impose liability for failure to perform conditions where it belongs -- on the defendant. But it would also, consistent with statutory and case law as described, protect innocent family members and others who may have secured a bond from the risk of loss for conduct that they cannot control. It will further assure that criminal defendants continue to have access to bail as required by due process.

We greatly appreciate your consideration of this issue and your attempt to reconcile court rules with statutory law. Please do not hesitate to contact us with any questions that you may have.

Very truly yours,

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cc: Messrs. E. Lee
T. Parker
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Ron Marsh
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ACR:sg